

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 8, 2009

CHRISTY S. BROWN v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Wilson County
No. 07-0082 Jane Wheatcraft, Judge

No. M2009-00506-CCA-R3-PC - Filed March 5, 2010

The Petitioner, Christy S. Brown, pled guilty to one count of aggravated robbery, and the trial court sentenced him to ten years in the Tennessee Department of Correction (“TDOC”). The Petitioner filed a petition for post-conviction relief in which he alleged that he received the ineffective assistance of counsel and that his guilty plea was not knowingly and voluntarily entered. The post-conviction court summarily dismissed the petition, finding that the Petitioner failed to state a colorable claim. The Petitioner appealed, and, on appeal, both parties agree that the post-conviction court erred and that the case should be reversed and remanded. After a thorough review of the record and applicable authorities, we agree with the parties that the petition for post-conviction relief raises a colorable claim. We, therefore, reverse the case and remand it to the post-conviction court for proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed and Remanded

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and ALAN E. GLENN, JJ., joined.

Brody Kane, Lebanon, Tennessee, for the Appellant, Christy S. Brown.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Clark B. Thornton, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; Howard Lee Chambers, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

This case arises from the Petitioner’s robbery of the Key Stop Market on January 5,

2007. At the Petitioner's plea submission hearing, the State informed the trial court that, had the case gone to trial, the evidence would have proven:

[O]n the date of the indictment, Mr. Brown, along with a Mr. Enoch and a juvenile . . . entered the Key Stop Market, which is in the east end of the county here in Wilson County, with some weapons, committed a robbery.

They left in a vehicle. The vehicle was described. The vehicle was later found. Mr. Brown was around the vehicle . . . he took off . . . and was captured a short time later.

Upon being interviewed by law enforcement, he gave a statement admitting to his involvement in the robbery.

The trial court accepted the Petitioner's plea of guilty, and noted that the parties had agreed that the Petitioner would be sentenced to ten years in the TDOC to be served at thirty percent.

Within the statute of limitations, the Petitioner filed a petition for post-conviction relief in which he alleged that he had received the ineffective assistance of counsel, that his guilty pleas were not knowingly and voluntarily entered, and that his conviction violated his Sixth and Fourteenth amendment rights. The Petitioner did not verify his petition under oath.

The post-conviction court summarily dismissed the Petitioner's petition, finding that the petition failed to assert a colorable claim. The Petitioner appealed, and, on appeal, both parties agree that the case should be reversed and remanded.

II. Analysis

Review of a post-conviction court's summary dismissal of a petition for post-conviction relief presents a question of law this Court reviews de novo. *See Arnold v. State*, 143 S.W.3d 784, 786 (Tenn. 2004) (citing *Burnett v. State*, 92 S.W.3d 403, 406 (Tenn. 2002)); *see also Fields v. State*, 40 S.W.3d 450, 457 (Tenn. 2001).

Tennessee Code Annotated section 40-30-106(d) sets out certain requirements for petitions for post-conviction relief and permits a post-conviction court to dismiss inadequate petitions or allow pro se petitioners an opportunity to amend:

The petition must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings.

Failure to state a factual basis for the grounds alleged shall result in immediate dismissal of the petition. If, however, the petition was filed pro se, the judge may enter an order stating that the petitioner must file an amended petition that complies with this section within fifteen (15) days or the petition will be dismissed.

T.C.A. § 40-30-106(d). The Rules of the Tennessee Supreme Court clarify that a post-conviction court's first obligation upon receipt of a petition is to review it in order to determine whether it states a colorable claim and, if so, to issue a preliminary order that, among other things, appoints counsel for indigent petitioners and sets a deadline for the filing of an amended petition:

(2) Within thirty (30) days after a petition or amended petition is filed, the judge to whom the case is assigned shall review the petition and all documents related to the judgment and determine whether the petition states a colorable claim.

(3) In the event a colorable claim is stated, the judge shall enter a preliminary order which:

- (a) appoints counsel, if petitioner is indigent;
- (b) sets a deadline for the filing of an amended petition;
- (c) directs disclosure by the state of all that is required to be disclosed under Rule 16 of the Tennessee Rules of Criminal Procedure, to the extent relevant to the grounds alleged in the petition, and any other disclosure required by the state or federal constitution;
- (d) orders the state to respond and, if appropriate, to file with the clerk certain transcripts, exhibits, or records from the prior trial or hearing; and
- (e) makes other orders as are necessary to the efficient management of the case.

Tenn. Sup. Ct. R. 28, § 6(B)(2)-(3). Accordingly, whether it is appropriate for a trial court to summarily dismiss a petition for post-conviction relief without allowing a petitioner the opportunity to amend or appointing counsel depends on whether the petition states a colorable claim. *See id.*; *see also Arnold*, 143 S.W.3d at 786-87.

Whether a petition states a colorable claim depends on the facts alleged. *See Arnold*, 143 S.W.3d at 786; *Burnett*, 92 S.W.3d at 406-07. Our supreme court has stated that “[a] colorable claim is one ‘that, if taken as true, in the light most favorable to the petitioner, would entitle the petitioner to relief under the Post-Conviction Procedure Act.’” *Arnold*, 143 S.W.3d

at 786 (quoting Tenn. Sup. Ct. R. 28, § 2(H)). As such, “if the facts alleged, taken as true, fail to show that the petitioner is entitled to relief, or in other words, fail to state a colorable claim, the petition shall be dismissed.” *Burnett*, 92 S.W.3d at 406 (citing T.C.A. § 40-30-206(f) (2007)). In addition, in determining whether a colorable claim has been presented, “pro se petitions are to be ‘held to less stringent standards than formal pleadings drafted by lawyers.’” *Gable v. State*, 836 S.W.2d 558, 559-60 (Tenn. 1992) (quoting *Swanson v. State*, 749 S.W.2d 731, 734 (Tenn. 1988)).

In his petition, the Petitioner asserted that he was entitled to post-conviction relief because his trial counsel was ineffective in that his counsel was unprepared for trial and had failed to interview multiple witnesses and because his guilty plea was unknowingly and involuntarily entered in that he told his lawyer he wanted a jury trial and was coerced to plead guilty by his counsel. Granting the pro se Petitioner due leeway, accepting all his allegations as true, and viewing them in a light most favorable to him, we conclude that he stated a colorable claim of ineffective assistance of counsel. *See Hicks v. State*, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998) (stating that, in order to set out a claim of ineffective assistance of counsel in the context of a guilty plea, the petitioner must demonstrate that, “but for counsel’s errors, he would have not have pleaded guilty but would have insisted upon going to trial”) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)) (other citation omitted).

The State accurately notes that the Petitioner did not verify the petition for post-conviction relief under oath, as required by Tennessee Code Annotated section 40-35-104(e) (2007). As stated above, if the petition was filed pro se, “the judge may enter an order stating that the petitioner must file an amended petition that complies with this section within fifteen (15) days or the petition will be dismissed.” T.C.A. § 40-30-106(d). Tennessee Supreme Court Rule 28, section 6(B)(4)(b) states, “No pro se petition shall be dismissed for failure to follow the prescribed form until the court has given petitioner a reasonable opportunity to amend the petition with the assistance of counsel.” Accordingly, we direct the post-conviction court to provide the Petitioner a reasonable opportunity to amend the petition to verify the petition under oath.

III. Conclusion

Having found that the Petitioner presented a colorable claim, we reverse the post-conviction court’s order summarily dismissing his petition and remand for the appointment of counsel and further proceedings consistent with this opinion.

ROBERT W. WEDEMEYER, JUDGE